Nos. 76-46 and 76-56

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In the Supreme Court of the United States

October Term, 1976

The American Tobacco Company, et al., petitioners

v.

John Patterson, et al.

Tobacco Workers' International Union, et al., petitioners

v.

John Patterson, et al.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Robert H. Bork,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

Abner W. Sibal,
General Counsel,

Joseph T. Eddins,
Associate General Counsel,

Beatrice Rosenberg,
Assistant General Counsel,

Margaret C. Poles,
Attorney,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS

v.

JOHN PATTERSON, ET AL.

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, ET AL., PETITIONERS

v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below correctly found that petitioners engaged in unlawful employment practices by discriminating against individuals with respect to promotions because of their race and sex.

2. Whether the court of appeals correctly held that the individual victims of petitioners' unlawful employment practices should be awarded back pay from the time they were unlawfully denied a promotion until the time they obtain their rightful place.

3. Whether the Equal Employment Opportunity Commission may properly bring a civil action alleging discrimination against women on account of their sex when the facts concerning such discrimination were discovered by the Commission in the course of its investigation of a male employee's charge of sex discrimination.

4. Whether the courts below correctly found that employees of the company's two plants, located in the same city only a few blocks from each other, do not "work in different locations" within the meaning of the exemption contained in 42 U.S.C. 2000e-2(h).

STATEMENT

The Equal Employment Opportunity Commission brought this action in the United States District Court for the Eastern District of Virginia against the American Tobacco Company and Local 182 of the Tobacco Workers' International Union.[1] The Commission alleged, *inter alia*, that the company and the local union had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 by discriminating against individuals with respect to promotions because

[1]The Commission's suit was consolidated with a previously filed private class action, which had named as an additional defendant the Tobacco Workers' International Union. The International was not a party to the Commission's action, and we do not address the issue, presented by the petition in No. 76-56, whether the International was properly held liable for the Title VII violations in this case.

of their race and sex. The allegations related to promotion practices in the company's two plants and its administrative office in Richmond, Virginia.

After a trial, the district court found that, "except for the non-supervisory employees in the Richmond [Administrative] Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex" (Pet. App. 44a).[2] The court also found that petitioners failed to carry their burden of rebutting the *prima facie* showing of discrimination or of demonstrating "that the discrimination is caused by business necessity" (Pet. App. 45a). The district court accordingly entered a decree (Pet. App. 89a-102a) providing a broad range of relief, including requirements that the company institute a company-wide seniority system, eliminate certain lines of progression, post definite job descriptions, grant back pay, and make appropriate adjustments in pension and profit-sharing plans. The decree also provided that blacks and women with greater company-wide seniority should be allowed to "bump" whites and men with less seniority from their existing jobs (Pet. App. 93a-96a), and that the company should fill supervisory vacancies with qualified blacks and women until their percentages in supervisory positions approximately equal their percentages in the work force (Pet. App. 97a-98a).

On appeal, the court of appeals "conclude[d] * * * that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies

[2]"Pet. App." refers to the separately bound appendix to the petition for a writ of certiorari in No. 76-46.

of their bargaining agreements and practices" (Pet. App. 8a; see also Pet. App. 23a). In response to petitioners' challenge to the district court's relief, however, the court of appeals modified the decree in several material respects.

First, whereas the district court ordered the company to maintain only a single seniority register for its two Richmond plants so that an employee in one plant could transfer to better paying jobs in the other without loss of company seniority, the court of appeals held that only those employees who suffered unlawful discrimination as a consequence of the separate seniority lists should be allowed to transfer without loss of company seniority (Pet. App. 10a-11a; see also Pet. App. 23a). Second, the court of appeals eliminated the "bumping" provisions of the decree and substituted a requirement of "full monetary compensation" (Pet. App. 20a) to the individual victims of prior unlawful discrimination—*i.e.*, an award of back pay from the date an individual was unlawfully denied promotion to the date of judgment, to be "supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position" (Pet. App. 18a-19a).[3] Third, the court of appeals held that, although Title

[3]The court of appeals left to the district court the final formulation of relief designed to accomplish the objective of full "compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability" (Pet. App. 20a). The opinion made clear that the court's suggestion of an award of "front pay" was meant to be illustrative rather than conclusive. The court stated: "Alternatively, the [district] court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account" (Pet. App. 19a).

VII would not preclude preferential hiring as an element of relief for unlawful discrimination in the hiring of supervisors, "the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota" (Pet. App. 31a). The court therefore eliminated the preferential hiring provisions of the district court's decree.

ARGUMENT

1. Petitioners argue (ATC Pet. 8-12; Union Pet. 7-11)[4] that the district court's finding of unlawful post-1965 promotional discrimination—a finding that the court of appeals upheld as "amply support[ed]" by the record (Pet. App. 8a)—is in fact not supported by the record. What perpetuated the effects of the overt pre-Act discrimination (see Pet. App. 5a-6a, 23a), according to petitioners, was not their post-Act promotion practices but rather the impact of "automation and a stagnant economy" (Union Pet. 9).

This factual issue was thoroughly considered and correctly resolved by the court of appeals, which determined that the effects of the prior overt discrimination were perpetuated by a *combination* of a static economic situation *and* petitioners' promotion policies, which "allowed little advancement of black employees" from the lower paying to higher paying jobs from which they were formerly excluded on account of their race (Pet. App. 6a). Even after 1968, when the company discontinued its discriminatory "qualifications system," "access to certain jobs was barred to black employees

[4]"ATC Pet." refers to the petition in No. 76-46. "Union Pet." refers to the petition in No. 76-56.

by lines of progression and the maintenance of separate seniority rosters for each [of the two Richmond plants]" (Pet. App. 7a).

Similarly, although the company's pre-Act overt discrimination against women was "nominally eliminated in 1963," its "discriminatory effect was [thereafter] perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers" (Pet. App. 23a).

Although the court of appeals found additional support for the finding of unlawful discrimination in statistics showing the continued manifestation of segregation by race and sex in the company's work force (Pet. App. 7a-8a, 23a), it did not purport to rest its conclusion solely upon those statistics, nor did it "construe Title VII to require an employer to eliminate statistical imbalances which might exist in its work force" (ATC Pet. 9). Rather, the court correctly found substantial evidence that the company's post-Act promotion practices had the unlawful effect of freezing blacks and women into jobs to which they had previously been assigned because of their race or sex.

2. The court of appeals modified the district court's decree by eliminating the "bumping" provisions and substituting a requirement that the victims of the unlawful employment discrimination be compensated for any loss of wages from the time they were unlawfully denied a promotion until the time they actually achieve their rightful place within the company. The court suggested, but did not mandate (see n. 3, *supra*), a form of relief that would combine an award of back pay for the period up to the date of judgment and an award (referred to by petitioners as "front pay") for the period after the date of judgment. Petitioners argue (ATC Pet. 12-15; Union Pet. 16-18) that the "front pay" element of such

relief would be improper because, under Title VII, "back pay must terminate, at the latest, on the date of judgment" (ATC Pet. 13).

There is no such remedial limitation in the statute. It provides that, on a finding of intentional discrimination, a court may issue injunctive relief and may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. (Supp. V) 2000e-5(g). The purpose of this provision was to give the courts "broad equitable discretion" " 'to fashion the most complete relief possible' " with the aim of restoring the victims of unlawful employment discrimination " 'to a position where they would have been were it not for the unlawful discrimination' " (*Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 14-15). The effect of the Act's broad remedial provision is to empower "federal courts * * * to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims" of unlawful employment discrimination (*id.* at 15).

It may be an adequate make-whole remedy in many cases to advance the victims of the unlawful discrimination to their rightful place in the employment system and to award back pay to compensate them for past loss of wages. Because of the peculiar circumstances of this case--including a static economic condition that limited the number of new vacancies—prompt advancement of the blacks and women to their rightful place in the company could be achieved only by "bumping" existing employees from their positions. The court of appeals found that "bumping" relief would be unduly disruptive

in light of all the circumstances and that rightful place relief should be limited to the filling of new vacancies.

Recognizing, however, that the individual victims of the unlawful discrimination will, until they achieve their rightful place, continue to suffer the economic injury caused by the discrimination, the court correctly concluded that a proper make-whole remedy should include a form of compensation for future, as well as past, loss of wages. In the absence of such a remedy, "[a]dequate relief may well be denied" (*Franks* v. *Bowman Transportation Co., supra,* slip op. 15), because the past discrimination would continue to affect the future wages of those who were unlawfully denied promotions.

The cases relied on by petitioners do not hold that "front pay" relief is barred by the Act. In *Sabala* v. *Western Gillette, Inc.*, 516 F. 2d 1251 (C.A. 5)—the only case in which prospective monetary relief was specifically addressed—the court of appeals held only that the district court properly declined to award such relief because it was unnecessary in the particular circumstances. To say, as the Fifth Circuit did in *Sabala,* that front pay is not in every instance "required as a matter of law" (516 F. 2d at 1266) is not to suggest that front pay is prohibited as a matter of law.

3. The company argues (ATC Pet. 18-21) that EEOC should not have been permitted to bring this action insofar as its complaint alleged discrimination against women on account of their sex, because no woman employee filed such a charge with the Commission. There was, however, a charge of sex discrimination filed by a male employee, and the company's discrimination against women was discovered by the Commission in the course of its investigation of the male employee's

charge (Pet. App. 22a, 32a). The Commission's determination of reasonable cause included a finding of sex discrimination against women.[5] The Commission thereafter engaged in conciliation efforts with the company with respect to all the matters addressed by the reasonable cause determination, and it brought this suit only after notifying the company that conciliation efforts were deemed to have failed.[6]

It is now established that EEOC may include in a suit brought after failure of conciliation allegations concerning any matter uncovered during a reasonable investigation of a properly filed charge—even if the matter is outside the scope of the original charge—as long as it is addressed in the Commission's reasonable cause determination. *Equal Employment Opportunity Commission* v. *General Electric Co.*, 532 F. 2d 359 (C.A. 4); *Equal Employment Opportunity Commission* v. *Raymond Metal Products Co.*, 530 F. 2d 590 (C.A. 4); *Equal Employment Opportunity Commission* v. *Occidental Life Insurance Co.*, 535 F. 2d 533 (C.A. 9), petition for certiorari pending, No. 76-99. See *Equal Employment Opportunity Commission* v. *Huttig Sash & Door Co.*, 511 F. 2d 453 (C.A. 5); *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352 (C.A. 6). These courts have recognized that the Commission need not disregard discrimination that it finds in the course of a reasonable investigation but may properly seek to eliminate all discriminatory practices so uncovered. Where the uncharged forms of discrimination are addressed in the reasonable cause determination, the

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[5]See Attachment A to the Commission's brief in the court of appeals.

[6]*Id.*, Attachment B.

employer has ample time to conciliate the issues with the Commission and to correct the discrimination found.

Equal Employment Opportunity Commission v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), on which petitioners rely, is not to the contrary. The court of appeals there held only that the Commission improperly failed to comply with its own regulations governing notice of a failure of conciliation. Those regulations were complied with in this case. The Commission's regulations do not preclude premising a reasonable cause determination on facts discovered in the course of an investigation of a properly filed charge.

4. Petitioners object to the court of appeals' holding that the victims of the company's prior discrimination should be allowed to transfer from one to the other of the company's two Richmond plants (ATC Pet. 16-17). The contention rests on the provision that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment * * * to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * * ." 42 U.S.C. 2000e-2(h).

The court of appeals correctly concluded that the "different locations" exemption is unavailable to petitioners. First, the company's two Richmond plants—"only a few city blocks apart"—"are not in different locations" (Pet. App. 12a).[7] Second, the exemption

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[7] The court stated that the company "hires employees for both branches from the same labor market"; "[t]here are entry level jobs at both places that require neither particular skills nor experience"; "[t]he same bargaining agreement covers employees at both plants, and the company has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority"; the Richmond administrative office serves both plants; and one plant ships the other's products (Pet. App. 12a-13a).

applies only when the "differences in the conditions of employment 'are not the result of an intention to discriminate' " (Pet. App. 13a). In this case, " 'where present differences in working conditions are remnants of past intentional discrimination, the proviso of §2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations' " (*ibid.*). See *Russell* v. *American Tobacco Co.*, 528 F. 2d 357, 363 (C.A. 4), certiorari denied, No. 75-1081, April 19, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
Assistant General Counsel,

MARGARET C. POLES,
Attorney,
Equal Employment Opportunity Commission.

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